In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 276

JOHN GONZALES and JOHN CHIEROTTI,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan Fiske Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

John Gonzales and John Chierotti hereby petition for a writ of certiorari to the Supreme Court of the State of California on the ground that each of their convictions, in the Superior Court of the State of California, of a felony, to wit: conspiracy to commit

(NOTE): All page references herein are to the certified typewritten record on file. The record has not as yet been printed and time will not permit delay until such is done.

grand theft, is void for want of the essential elements of due process in that they were tried and convicted on evidence acquired by officers of the State of California as the result of an unlawful search and seizure of property in the petitioner Chierotti's dwelling.

Petitioner Chierotti seasonably moved the trial court for an order directing the return to him of said property and to suppress and exclude all evidence relating to the unlawful search and seizure. The court denied said motion. Each petitioner, at all stages of the proceeding in the trial court, unsuccessfully objected to the use of such evidence as being violative of the due process clause of the Fourteenth Amendment and challenged such convictions before the Supreme Court of the State of California on like grounds. That court entertained the challenge, considered the Federal question presented, but, by a divided court, refused to enforce petitioners' constitutional rights.

STATEMENT OF THE CASE.

Petitioners were indicted for conspiring together to commit the crime of grand theft (grand larceny) by conspiring to steal money from one Secundo Valenzano by means of a machine which they were charged with representing to Valenzano could duplicate United States currency. (R. 1-6.)

Chronologically stated the pertinent facts are as follows:

On June 6, 1940, Charles L. Iredale, a regular police officer of the City and County of San Francisco, ar-

rested petitioners while they were in an automobile on a street in San Francisco. (R. 190.) The police officer then drove them to a police station where they were searched. (R. 191.)

On the same day, while petitioners were held in custody, Police Officer Iredale and Police Officer Linss, also a member of the San Francisco Police Department, went to the home of petitioner Chierotti, in the Keystone Apartments in San Francisco, Apartment 41, and without any warrant, order or authority of any kind or character and without the permission of Chierotti or any other person, entered Chierotti's apartment and there found a black bag or case in which was an electrical machine (said electrical machine being the one claimed to have been used in conjunction with the representations to Valenzano that it could reproduce U. S. currency.) (R. 102-103, 106-107.)

After the unlawful search of Chierotti's apartment, the police officers took the bag and contents back to where petitioners were in custody and questioned each of them about the black bag. (R. 206-209.)

Thereafter the charge was heard by the Grand Jury of the City and County of San Francisco and at said hearing the bag and its contents were exhibited to the Grand Jury and Police Officer Iredale testified that Valenzano had identified it as the money making machine that had been brought to his place and shown to him by petitioner Gonzales. (R. 19.)

On June 17, 1940, the indictment was returned against petitioners and filed in said Superior Court.

On June 27, 1940, each petitioner entered his plea of not guilty to the charge.

On September 6, 1940, six months before the trial, petitioner Chierotti filed a written motion in the trial court for an order directing the return to him of the case and contents taken by the police officers from his apartment on June 6 as the result of such unlawful search and seizure and for orders suppressing and excluding from evidence, at the trial, said physical property, all testimony of said police officers relative to such search and seizure, anything they saw or did in said apartment and any testimony based on information acquired as the result of such unlawful search and seizure. (R. 11-15.)

Said motion was based upon the ground that to allow said physical property to be admitted in evidence against him at the trial or to allow said police officers to testify as to anything they saw or did during said unlawful search and seizure would be in violation of the rights guaranteed to Chierotti by the due process clause of the Fourteenth Amendment to the Constitution of the United States. (R. 15.)

Said motion was supported by the affidavit of John Chierotti alleging in substance that said apartment was his home and dwelling; that said police officers were peace officers of the State of California; that they entered said apartment without any writ, order, warrant or authority of any kind or character and without the permission of Chierotti or any other person and took said physical property away therefrom without any writ, process or authority so to do and with-

out the permission of Chierotti or any other person. (R. 16-23.) The affidavit prayed for the court to make the same orders specified in the motion and to suppress and exclude such things from evidence at the trial on the ground that their use as evidence against Chierotti would be "in violation of the rights guaranteed to him by the provisions of both the State and Federal Constitutions that he shall not be deprived of his life, liberty and property except by due process of law". (R. 23.)

No counter-showing of any kind was made by the State.

The trial court denied said motion and the whole thereof. (R. 24.)

The trial of petitioners on said indictment commenced on March 24, 1941. (R. 28.) Repeatedly and throughout the trial each petitioner objected to the admission and use in evidence of the bag and contents so taken by the police officers from Chierotti's apartment on June 6, 1940, and to any testimony relating thereto, on the ground that the admission of such evidence against the petitioner Chierotti and also against the petitioner Gonzales was in violation of the Fourteenth Amendment to the Constitution of the United States. The trial court denied each of these objections. Motions were made to strike out such evidence (R. 259-263) and the court denied said motions. (R. 266.)

The portions of the record showing the making of the motions, the grounds therefor and the rulings of the court thereon will be hereafter set forth in full.

Each petitioner was convicted and appealed to the District Court of Appeal of the State of California, First Appellate District, on the grounds that they were convicted without due process of law as guaranteed by the Fourteenth Amendment, based upon the use by the State and admission in evidence of the bag and contents and testimony based on information acquired by the State officers as the result of such unlawful search and seizure.

The Supreme Court of the State of California, prior to the cause being decided by the said District Court of Appeal, ordered the cause transferred to said Supreme Court for hearing and decision (R. 379) pursuant to section 4c of Article VI of the California Constitution.

The Supreme Court entertained the constitutional questions involved and by a divided court decided said constitutional questions against each of said petitioners. The majority opinion was rendered by five of the justices of said court (R. 380-388) while two justices of said court rendered a dissenting opinion. (R. 389-394.)

The result of depriving defendants of their constitutional rights becomes apparent when we consider that they were charged with conspiring with each other to commit the felony. No other person was involved or charged as being involved in the conspiracy. The testimony of the complaining witness Valenzano was to the effect that all of the dealings and negotiations were had solely between him and petitioner Gonzales and that *he never saw the petitioner Chierotti*

until the time of the trial in the Superior Court. (R. 162.) In the absence of the evidence acquired by the state officers, in conducting the unlawful search and seizure, there is no evidence in the record sufficient to connect petitioner Chierotti with the conspiracy charged.

THE CONSTITUTIONAL QUESTIONS INVOLVED.

The constitutional questions involved are as follows:

1. Is not the right to be secure against unreasonable and unlawful searches and seizures by state officers such a fundamental principle of liberty and justice, lying at the base of all our civil and political institutions, as to be embraced within the protection of the due process clause of the Fourteenth Amendment?

2. Does not the use by a state, against a defendant in a criminal trial, of evidence obtained by the state solely as the result of an unlawful search and seizure of said defendant's home, constitute a denial of due process of law as guaranteed in the Fourteenth Amendment?

3. Is not the conviction of a defendant void as lacking the essential elements of due process where such conviction was procured by the state using evidence acquired by its officers as the result of an unlawful and unreasonable search and seizure of the defendant's premises?

4. Where the State Supreme Court admits that an unlawful search of a defendant's home and the un-

lawful seizure therein of personal property constitute a denial of due process of law as guaranteed in the Fourteenth Amendment, does not the decision of said State Supreme Court run counter to the Fourteenth Amendment and deny to the defendant due process of law where it holds that such evidence can be used against the defendant at his trial for a criminal offense, even though he has seasonably objected to the use thereof?

5. Where the decision of the State Supreme Court admits that there is a denial of due process in every instance where state officers acquired evidence by an unlawful search of and seizure in the home of a defendant, does not the decision of such court abrogate and nullify such constitutional right when it unequivocally holds that the state can in every instance use such evidence against the defendant at his trial?

STATEMENTS REQUIRED BY RULES 12 AND 38 OF THE SUPREME COURT.

(a) Jurisdiction of the Court.

The jurisdiction of this court is invoked under section 237 of the Judicial Code of the United States.

The basis upon which it is contended that this court has jurisdiction is as follows:

This court has held that certiorari will issue to review a conviction of defendants based upon the use by a state of evidence acquired by the state in a manner prohibited by the Fourteenth Amendment. This court has further held that every principle of

liberty and justice lying at the basis of our civil and political institutions is a principle protected by the due process clause of the Fourteenth Amendment. This court has likewise held that the right to be secure against unreasonable search and seizure by state action is such a fundamental principle of liberty and justice and includes the right of a defendant not to have the state use against him evidence acquired in such unlawful manner. Herein the main evidence used by the state was acquired as the result of an unlawful search and seizure conducted by its officers.

(b) Cases Sustaining Jurisdiction.

Petitioners believe that the following cases sustain the jurisdiction of this court:

Brown v. Mississippi, 297 U. S. 278, 80 L. ed. 682;

Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158;

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716;

Lisenba v. California, L. ed. Adv. Ops. Vol. 86, p. 179, 62 Supreme Court 280.

(c) The Decision and Judgment of the California Supreme Court.

The majority opinion of the California Supreme Court was rendered on April 2, 1942. (R. 380.)

A petition for rehearing was denied by the California Supreme Court on May 2, 1942. (R. 395.)

The judgment affirming the convictions of petitioners was entered on April 2, 1942, and became final on May 4, 1942, when the remittitur issued out of said Supreme Court to the trial court. (R. 399.)

(d) The Stage in the Proceedings in the Court of First Instance at Which and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised, Etc.

The manner in which the constitutional question, of whether evidence acquired by a state in an unlawful search and seizure of a defendant's home could be used as evidence against such defendant in the face of special invocation of the due process clause of the Fourteenth Amendment, arose in the trial court and that court's ruling thereon is as follows:

On June 6, 1940, six months before the actual trial of the action, petitioner John Chierotti appeared in the trial court and filed a written motion for an order directing the return to him of the case and contents taken by the police officers from his home and apartment and to suppress and exclude from the evidence at the trial said physical property, all testimony of the officers relative to such search and seizure, anything they saw or did in said apartment or any testimony based on information acquired as the result thereof, etc. The motion was based upon the ground that the use of such evidence against him at the trial would be in violation of the rights guaranteed to him by the due process clause of the Fourteenth Amendment.

Said written motion will be found in the Record from pages 11 to 15 and reads as follows:

> "Comes now John Chierotti, one of the defendants above named, and moves the above entitled court for an order directing the Chief of Police of the San Francisco Department and/or the Property Clerk thereof, to return to him all of

that personal property taken on the 6th day of June, 1940, from apartment No. 41 in the Keystone Apartment, located at No. 1369 Hyde Street, in the City and County of San Francisco, State of California, by those certain members and officers of the San Francisco Police Department, to wit: Police Inspector Charles Iredale and Police Inspector Louis H. Linss and which property is now and ever since the date of its taking, as aforesaid, has been in the custody and under the control of said Chief of Police and/or said Property Clerk and/or said San Francisco Police Department. That said personal property is particularly described and set forth in the affidavit of said John Chierotti hereunto attached and special reference is hereby made to said affidavit and the same is included in this motion with like force and effect as if the same were fully set forth herein. Said motion is based upon this notice of motion and the said affidavit of John Chierotti and is based upon the ground that the taking of said property by said police officers at said time and place was and is in violation of section 19 of Article I of the Constitution of the State of California and is violative of the rights guaranteed to defendant herein by said constitutional provision and section, all as is more fully set forth in said affidavit of John Chierotti.

Said defendant further moves the court for each of the following orders, to wit:

1. An order suppressing and excluding from evidence, as evidence against said defendant, in the trial of the above entitled cause, said foregoing described personal property and every part thereof.

2. An order suppressing and excluding from evidence at the trial of the above cause any and all testimony to be given by the said Police Inspector Iredale and/or the Police Inspector Linss relative to anything they or either of them did or saw in said apartment No. 41 of said Keystone Apartments, as aforesaid, upon or following their entry into said apartment on June 6, 1940, as fully appears in the affidavit of John Chierotti attached hereto and filed herewith, special reference to which affidavit is hereby made and by said reference said affidavit is included in this motion with like force and effect as if the same were set forth in full herein.

3. An order suppressing and excluding from evidence at the trial of the above cause, as evidence against said defendant, any and all testimony to be given by the said Inspector Iredale and/or the said Inspector Linss and/or any member of the Police Department of the City and County of San Francisco, relative to said foregoing personal property or any part thereof based upon any knowledge thereof acquired by an exhibition or view of said personal property from and after the entry of said Police Inspectors into said apartment No. 41 of said Keystone Apartments, as aforesaid, on June 6, 1940.

4. An order suppressing and excluding from evidence any testimony to be given by said Inspector Iredale and/or said Inspector Linss and/or any other member of said Police Department as to any conversation had with defendant or any statements made by defendant to either or both of said inspectors or to any other member of the San Francisco Police Department

relative to said personal property, or any part thereof, which said statements were made by defendant or conversations were had with defendant after the taking of said personal property from said apartment No. 41, as aforesaid, and which said statements or conversations were based upon any knowledge acquired by the persons questioning or conversing with defendant from an inspection or view of said personal property from and after the entry of said Police Inspectors into said apartment No. 41 on June 6, 1940, as aforesaid.

5. An order suppressing and excluding from evidence any photographs made of said personal property, or any part thereof, or any description taken thereof or any testimony relating thereto where such photographs were made, descriptions taken, or testimony is based upon a view or inspection of said personal property made when said Police Inspectors entered said apartment on June 6, 1940, as aforesaid, and/or any time thereafter.

The motion for each of the foregoing orders is based on this written motion and on the said affidavit of John Chierotti attached hereto, which affidavit is incorporated in and made a part of this motion and said motion is based upon the ground that said property was unlawfully taken by said Police Inspectors on June 6, 1940, in violation of the provisions of section 19 of Article I of the Constitution of the State of California and that *to allow any of the things to be said or done, for the suppression and exclusion of which this motion is made, would be in violation of the rights guaranteed to said defendant by the said*

provision of the Constitution of the State of California and would deny to said defendant that due process of law as guaranteed to him by both the Constitution of the State of California and the Constitution of the United States of America."

The foregoing motion was supported by the affidavit of John Chierotti (R. 16-23), which alleged in substance that he was one of the defendants named in said cause, that for many months prior to June 6, 1940, his place of abode, residence and habitation was the apartment 41 in the Keystone Apartments, at 1369 Hyde Street, San Francisco; that during said time he was the lessee of said apartment, was paying the rent therefor and had full and exclusive charge and control of said apartment and that the same was his house and dwelling; that on June 6, 1940, he had in said apartment and under his exclusive custody and control the said black bag and its contents the electrical machine (minutely describing the same); that on June 6, 1940, Charles L. Iredale and Louis H. Linss were regular and acting members of San Francisco Police Department and each was a peace officer of the State of California; that on the said last mentioned date the said Iredale and Linss entered his home and apartment in the Keystone Apartments and took therefrom said bag and contents, and when they entered said apartment said police officers did not have any warrant, writ or other process issued by any court, judge or magistrate of the State of California, or otherwise or at all, authorizing them or either of them or any member of the San Francisco Police Department or any other person to enter said

apartment or to take therefrom any personal property and that no such warrant had ever been issued at all; that neither affiant nor any other person having dominion over said apartment had ever given to said police officers Iredale or Linss any permission, right or authority to enter said apartment, as aforesaid or otherwise, and to take therefrom said personal property or any other property; that the entry of said apartment and the taking of said property by said police officers was in violation of affiant's right to be secure in his person, house, papers and effects against unreasonable searches and seizures.

The affidavit contained a prayer for orders directing the return to Chierotti of the property so taken by said police officers and for further orders suppressing and excluding from evidence all of said personal property and any and all evidence and testimony relating to things seen or done by said police officers on the entry into said apartment, and suppressing and excluding from evidence any testimony to be given by either of said police officers relative to any conversation had with Chierotti or any statements made by Chierotti to them relative to said personal property after the taking of the same from said apartment and based on any knowledge acquired by the persons questioning or conversing with affiant from an inspection or view of said personal property when or after it was so taken from said apartment.

The affidavit concluded with the following express invocation of the Fourteenth Amendment (R. 22), to wit:

"That unless the orders herein prayed for be made by this court said personal property will be offered in evidence against affiant at the trial of the above cause and that said members of the San Francisco Police Department will be allowed to testify as to the matters and things hereinabove set forth, all to the great and irreparable damage of affiant and in violation of the rights guaranteed to him by the provisions of both the State and Federal Constitutions that he shall not be deprived of his life, liberty or property except by due process of law and in violation of the foregoing provision of the State Constitution protecting him against unlawful search and seizure."

No counter showing, by way of affidavit or otherwise, was made by the State to the foregoing motion. The same was argued before the court and continued until September 19, 1940, for decision at which time the trial judge denied the motion. (R. 24.)

At the opening of the trial the first witness called by the People was Secundo Valenzano. During his direct examination the prosecuting attorney ordered the clerk to bring into the courtroom for the first time the black bag and its contents which was done, whereupon the attorney for defendant Chierotti made the following objection:

"Mr. Friedman. Now, if the Court please, at this time on behalf of the defendant Chierotti, I am going to object to there being exhibited to the witness, for the purposes of identification or otherwise, or to the Jury, for consideration in this case, this particular suitcase and its con-

tents, that was just brought into court by the Clerk.

I object to the use of this evidence in any manner in this case, so far as the defendant Chierotti is concerned, on the ground that *the use of this evidence would be a violation of his Constitutional rights as guaranteed by the due process clause and equal protection and immunity clause of the 14th Amendment to the Constitution of the United States,* on the ground that this suitcase was acquired, and its contents were acquired, by the Police Department, members of the Police Department of the City and County of San Francisco, as a result of an unlawful search and seizure, inviolation of Section 9 of Article I of the State Constitution; and *in violation of the due process clause and equal protection and immunity clause of the 14th Amendment to the Federal Constitution of the United States;* and that this suitcase was taken from the premises, the Keystone Apartments, the home, apartment and dwelling of Mr. Chierotti, by Police Officers Iredale and Linss, on June 6th, 1940, when they entered those premises unlawfully and illegally, and without any warrant, or process or authority of any kind or character, and that as a result of these matters and things the acquisition of this suitcase and its contents is in violation of the Constitutions' proscription against the acquisition of evidence in such manner, and the use of the same would be in violation of the defendants' constitutional rights which I have already stated to the Court. * * *

In support of the various matters, and in order that your Honor may pass upon the point, it will

be necessary that I call various witnesses." (R. 123-124.)

A colloquy between court and counsel then ensued whereupon the following proceedings and stipulations were entered into:

"Mr. Garry (the prosecuting attorney). No, I would not stipulate to that. I will stipulate, your Honor, that after the arrest of the defendants Chierotti and Gonzales, and while they were in custody, the officers, Inspectors Iredale and Linss, as a result of information obtained by searching Chierotti, a letter they found in his pocket, went to 1465 Hyde Street, that is the Keystone Apartments, and asked the Clerk if a man by the name of Chierotti lived there, and the Clerk told them that he lived in Apartment 41, and the Clerk then sent the janitor up to the apartment No. 41, who opened the door of Chierotti's apartment in his absence, and the officers obtained this suitcase and contents.

The Court. Is that satisfactory?

Mr. Friedman. You will stipulate that at that time and place which you have just mentioned, also, that no warrant or authority of any kind had been obtained from any court, judge or magistrate of any court authorizing the Police Officers to enter those premises to take that property?

Mr. Garry. I will say the officers took that property without a search warrant.

Mr. Friedman. No warrant or authority.

Mr. Garry. They had no other express right or authority.

Mr. Friedman. No right or authority of any kind or character except they went there and took it.

Mr. Garry. That is right.

Mr. Friedman. Will you further stipulate, so we will have the facts straight,—will you further stipulate that that apartment on that date was occupied by Mr. Chierotti, and that was his home and dwelling, that is where he was living?

Mr. Garry. Yes, sir.

Mr. Friedman. And that he had the exclusive control of that apartment?

Mr. Garry. Yes.

Mr. Friedman. And that he gave no one permission to enter or to take the property?

Mr. Garry. That he didn't give the officers permission to enter the property, and he was not there to give the Clerk or the janitor permission to enter that place.

Mr. Friedman. Yes.

Mr. Garry. Yes, sir.

Mr. Friedman. Since the stipulation, I am satisfied.

Mr. Garry. Yes.

Mr. Friedman. It will be understood that this stipulation consists of our proof in support of our objection to the use of this testimony?

Mr. Garry. Yes.

The Court. Very well.

Mr. Garry. Is your Honor ready to rule?

The Court. Oh, yes." (R. 126-128.)

Following the foregoing the court overruled the objection. (R. 129.)

Valenzano was then shown the suitcase and asked if it looked like the one he saw in the possession of

John Gonzales at which time the following objection was made and the following stipulation entered into:

> "Mr. Friedman. Pardon me. If it please the Court, will it be understood that the objection to the use of this suitcase and/or its contents for the purpose of this trial that was made in the absence of the Jury may be considered as having been made at this time in the presence of the Jury?
>
> Mr. Garry. Yes.
>
> Mr. Friedman. And *the objection will go to any use made of it by the prosecution?*
>
> Mr. Garry. *Yes, sir.*
>
> The Court. *Very well.*" (R. 35.)

One Victor Pelitier, who was the clerk at the Keystone Apartments on June 6, 1940 was next called as a witness by the state. (R. 169.) He testified that he was on duty the day the police officers came and entered Chierotti's apartment and that he saw them come back downstairs. He was then asked if he saw them bringing anything down and he answered, "They brought the black suitcase down." (R. 175.) At this point counsel for petitioners moved that the answer be stricken out and objected to the question on behalf of each of the petitioners "on the ground the question calls for a violation of the constitutional rights of the defendant Chierotti * * * as guaranteed by the Fourteenth Amendment to the Constitution of the United States." (R. 175-176.) The court overruled the objection. (R. 176.)

Police Officer Iredale was then called as a witness by the State (R. 183) and testified in substance as

follows: that on June 6, 1940, about five o'clock in the afternoon he and Police Officer Linss went to the Keystone Apartments in San Francisco and proceeded to apartment 41. (R. 198.) He was then asked if he had ever seen the black bag or case before at which point counsel for petitioners was allowed to cross-examine and the witness Iredale testified as follows: that when he went to the Keystone Apartments neither he nor Mr. Linss had any search warrant to enter the apartment (R. 200), that to his knowledge no search warrant had been issued authorizing the Police Department to enter the apartment. (R. 201.)

Thereupon counsel for petitioners made the following objection and the court made the following ruling:

> "Mr. Friedman. In view of that, your Honor, at this time I desire to object to any testimony to be given by this officer, as to anything he saw or did from and after the moment of entering the apartment 41, in the Keystone Apartments, at or about the hour of 5:00 o'clock in the afternoon of June 6, 1940, on the following grounds, to-wit: That the entry of said apartment by said police officers at that time and place, without any legal right or authority, was in violation of the constitutional provisions of the State of California giving unto the defendant Chierotti the right to be immune from unlawful search and seizure of his personal effects, and upon the further ground that *the entry of the police officers into the apartment at that time and place, and anything they said or did there was in violation of the constitutional rights of the defendant Chierotti to be*

immune from unlawful search and seizure, and a violation of the privilege and immunity clause of the Federal Constitution, violative of the due process clause of the Federal Constitution, all of which are included in the 14th Amendment to the Constitution of the United States, and to allow the witness in this case, or the State, to rely upon any evidence that has been procured as a result of an unlawful search and seizure by the officials of the State of California is a denial to the defendant Chierotti, of the rights guaranteed to him by the 14th Amendment to the Constitution of the United States, and by the due process of law clause in the Constitution of the State of California; and in addition to that I make the same objection on behalf of the defendant Gonzales, it being I hope understood that that objection that I have gone through in full is made on behalf of each of the defendants.

Mr. Garry. So stipulated.

The Court. The same ruling as heretofore. The Court has already ruled. I will rule again, of course. The objection is overruled." (R. 201-202.)

The State then offered the bag and its contents in evidence against both of the petitioners. (R. 203.) Whereupon petitioners made the following objection and the court made the following ruling:

"Mr. Friedman. I objection to the introduction of the bag and apparatus, and the bag or the apparatus in evidence, on the ground, first on behalf of the defendant Chierotti that it is a violation of his Constitutional rights as I have heretofore outlined in my objection to any testimony to be given

by this witness, as to the entry of this said apartment; and likewise I object to it on behalf of the defendant Chierotti on the same grounds, and on the additional grounds that anything that this witness found in the apartment of the defendant Chierotti after the arrest of the defendants in this case was and is not binding or evidence against the defendant Gonzales.

The Court. The objection will be overruled." (R. 204.)

The court admitted the bag and its contents in evidence. (R. 204.)

At the conclusion of the People's case each defendant moved the court for an order striking out of the evidence the following things:

(1) The bag and its contents on the ground that it had been acquired by peace officers of the State of California as the result of an unlawful search and seizure and that their use in evidence against the defendant Chierotti constituted a deprivation as to him of due process of law as guaranteed by the Federal Constitution. (R. 260.)

(2) The testimony of Police Officer Iredale relative to his entry into the apartment of John Chierotti in the Keystone Apartments, as to what he saw there, as to his finding the bag and contents and as to his taking it away, and all evidence as to what he saw, did or found upon or following his entry into the apartment of John Chierotti, on the ground that the same were in violation of the Fourteenth Amendment, which included the right of Chierotti to be secure in

his person, houses, papers and effects against unlawful search and seizure. (R. 261.)

The trial court denied the foregoing motions to strike. (R. 266.)

(e) The Time and Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the Supreme Court of California and That Court's Action Thereon.

On conviction of petitioners they each promptly appealed from the judgments pronounced upon them and from the court's order denying their motion for a new trial. (R. 67.)

In support of their appeal and pursuant to the law governing the taking of such appeals, petitioners filed their designation of the points to be relied on by them on said appeals and in said designation specified, among other things, the following:

> "8. That the court erred in not upholding the constitutional rights of the defendant Chierotti by excluding from evidence and refusing to strike out therefrom all testimony relating to the unlawful entry without a search warrant into the home of the said John Chierotti on June 6, 1940, by members of the San Francisco Police Department, together with all testimony relative to said entry, what was seen or done there and all testimony based upon information acquired by said police officers as the result of such unlawful entry.
>
> 9. That the court erred in not excluding and refusing to strike out People's Exhibits Nos. 3, 4, and 6, the same having been unlawfully seized by members of the San Francisco Police Department on their entry into the home of John

Chierotti on June 6, 1940, without any search warrant having been issued and without permission having been given by the said John Chierotti, or anyone else having charge or control of said home or apartment so to do.

10. That the court erred in admitting in evidence any and all evidence and testimony relating to or acquired as the result of the entry into the home of John Chierotti on June 6, 1940, by members of the San Francisco Police Department, said entry being unlawful and in violation of section 19 of Article I of the Constitution of the State of California and in violation of the Fourteenth Amendment to the Constitution of the United States and the due process of law clause therein contained; that the admission of such testimony and of the physical articles acquired as the result of such unlawful search and seizure was and is in violation of the constitutional rights of John Chierotti as guaranteed to him by the Constitution of the United States and the due process of law clause thereof." (R. 70-71.)

The Supreme Court entertained and passed upon the constitutional questions raised by said appeal as is apparent from both the majority opinion (R. 380) and the minority opinion (R. 389) of said court.

The majority opinion of the California Supreme Court denied to petitioners the constitutional rights specially set up and claimed.

The portion of the majority opinion showing that the constitutional questions were properly raised by petitioners and the court's action thereon is as follows:

"Chierotti and Gonzales objected to any testimony by Officer Iredale regarding the entry and search of Chierotti's apartment and the seizure of the case and contents, as well as to the introduction and use of the latter as evidence, on the ground that the entry, search, seizure, and use of the property violated the rights guaranteed to Chierotti by the Fourteenth Amendment to the Constitution of the United States, * * *" (R. 381.)

"Defendants contend, however, that the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the federal constitution, however, fall within the concept of due process of law. (Citing cases.) In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures' may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to funda-

mental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. (See cases cited in 16 C. J. S. 1185 et seq.) There is a failure to observe that 'fundamental fairness essential to the very concept of justice' when a trial is but a pretense (Lisenba v. California, 62 Sup. Ct. 280, 290), as a trial dominated by a mob (Moore v. Dempsey, 261 U. S. 86), or when the defendant is denied the right to counsel (Johnson v. Zerbst, 304 U. S. 458), or when his conviction results from testimony known by the prosecution to be perjured (Mooney v. Holohan, 294 U. S. 103), or from an involuntary confession obtained through coercion or torture. (Chambers v. Florida, 309 U. S. 227; Brown v. Mississippi, 297 U. S. 278.)

While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra. See Bram v. U. S., 168 U. S. 532), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. (Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra; cf. Twining v. New Jersey, supra.) The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial." (R. 383-4.)

(f) The Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

No higher duty devolves upon any court than the enforcement and protection of a right guaranteed by the Constitution. In the present case the violation of the constitutional right of John Chierotti to be protected from unlawful and unreasonable search of and seizure upon his premises by state officers was a right of the highest character and one that should have been protected, from the inception of the proceedings, by the courts of California.

The right to be immune from unlawful search and seizure means more than that the person whose right is violated can resort to a civil action for the recovery of any property so illegally taken by state officers. This court, as pointed out in the brief filed in support of this petition, has invariably and unequivocally held that the right to be protected against unlawful search and seizure includes the right not to have used as evidence against the person whose right has been violated, any property, documents or information acquired by public officers as the result of such unlawful act.

This court has repeatedly held that any fundamental principle of liberty and justice is protected from infringement by the State under the due process clause of the Fourteenth Amendment. This court has also repeatedly held that the right to be secure against unlawful search and seizure is such a fundamental principle of liberty and justice.

The majority opinion of the Supreme Court of California has denied these great constitutional rights by holding that, although the right to be immune from unlawful search and seizure may fall within the protection of the due process clause, the use of evidence so acquired by a state does not fall within the protection of the Amendment.

We cannot use more apt words to demonstrate that the questions involved are substantial than those used by Mr. Justice Carter in the dissenting opinion concurred in by Mr. Justice Hauser:

> "It cannot be seriously questioned that to permit the use of evidence obtained in violation of the constitutional provision at least to some extent infringes upon the field of liberty secured by the inhibition against unlawful searches and seizures. But it goes beyond a mere partial invasion. It in effect practically destroys the right. That is true for the reason that the value of any right varies in direct proportion to the means afforded for the protection of the right; the realization of any benefit from the right is wholly dependent upon the existence of instruments for that purpose. If it may be violated and the fruits of the violation directed against the possessor of it, the fruits of it are lost, and it is no more than a bare abstraction." (R. 389.)
>
> "Permitting such evidence to be used is an invitation and encouragement to law enforcing officials to violate the Constitution. It gives them free reign to act upon mere suspicion and conjecture, to the harassment of the persons offended and to the end that the sanctity of his home or

depository of his papers and effects is destroyed. It is of small comfort to say that he has an action against the officers. In most instances the amount of recovery would be negligible and the process costly." (R. 390.)

"The more I read and hear about the tyranny of totalitarianism as it pervades a large part of the world today, the more appreciative I am of the constitutional form of government and the constitutional guarantees which we have in this country and in this state. And every time I see an effort being made to abrogate or nullify by interpretation any of the constitutional provisions designed to protect the life, liberty and property of the people, I shudder to contemplate what will happen if this disposition to abrogate and nullify these constitutional provisions continues. I, for one, shall never yield to the doctrine that a constitutional provision designed to protect the life, liberty and property of the people of this country should be abrogated or nullified by interpretation. If political, social or economic conditions require changes in our Constitution, such changes should be made by amending the Constitution in the manner prescribed by it, but it is not for the courts by their decisions to abrogate or nullify constitutional provisions by interpretation or read into those provisions that which was never intended to be included therein." (R. 393.)

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI.

Each petitioner advances the following reasons as the grounds relied on for the issuance of the writ prayed for herein.

First: That the California Supreme Court has decided a federal question of substance not heretofore determined by this court, to wit: whether the use by a state, in a criminal trial, over seasonable objection, of evidence acquired by the state conducting an unlawful search of and seizure upon defendant's premises, constitutes a denial of due process of law as guaranteed by the Fourteenth Amendment.

Second: That each petitioner was denied the benefits and convicted in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States by the lower court permitting the guilt or innocence of petitioners to be determined upon evidence acquired by the State as the result of an unlawful search and seizure; that the majority opinion of the California Supreme Court upholding such action is contrary to the prior decisions of the Supreme Court of the United States holding that the right to be secure from such unlawful search and seizure by state action is one of the fundamental principles of liberty and justice and that any such fundamental principle is protected from state action by the Fourteenth Amendment.

Third: That the majority opinion of the California Supreme Court, holding that where the State has

acquired property and evidence as the result of an unlawful search and seizure of a defendant's home, such defendant cannot have the property so unlawfully acquired returned to him or excluded from the evidence at his trial, although he had made seasonable application to the trial court for its return and exclusion, is contrary to applicable decisions of the Supreme Court of the United States.

Fourth: That the matters passed upon in the majority opinion of the California Supreme Court relative to the right of a person to be secure against unlawful search and seizure by state action is an important question of constitutional law decided in a way untenable and in conflict with the weight of authority and applicable decisions of this court.

Fifth: That the majority opinion of the California Supreme Court denying to each petitioner the right to have his guilt or innocence established without resort by the State to evidence acquired by it as the result of an unlawful search and seizure of the home of one of the petitioners renders the conviction of petitioners void as lacking the essential elements of due process of law and is directly contrary to applicable decisions of this court.

CONCLUSION.

For the reasons herein stated each petitioner respectfully prays that this Honorable Court issue a writ of certiorari to the Supreme Court of the State

of California to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, San Francisco, California,
July 27, 1942.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for petitioners in the above entitled cause and proceeding and that, in my judgment, the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
July 27, 1942.

LEO R. FRIEDMAN,
Attorney for Petitioners.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No.

JOHN GONZALES and JOHN CHIEROTTI,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF THE SUPREME COURT OF CALIFORNIA.

The majority opinion of the respondent court was rendered on April 2, 1942 (R. 380), reported in California Advance Reports in 28 A. C. 158.

The minority opinion of respondent court was rendered on the same date and is reported in the same volume at page 166.

(NOTE): All italics appearing in this brief, unless otherwise noted, have been supplied by the writer.

A petition for a rehearing was denied by respondent court on May 2, 1942. (R. 395.)

The judgment of respondent court became final on May 4, 1942, when the remittitur issued out of respondent court to the trial court. (R. 399.)

JURISDICTION.

The jurisdiction of this court is invoked under section 237b of the Judicial Code of the United States.

The grounds on which the jurisdiction of this court is invoked are as follows: that the California Supreme Court denied to each petitioner a right guaranteed by the Federal Constitution, which right was specially set up and claimed before said respondent court and decided against them.

The right contended for is that under the Fourteenth Amendment the state was prohibited from using against each of them, in a criminal trial, evidence acquired by state officers as the result of an unlawful search and seizure of the premises of petitioner Chierotti. Under applicable decisions of this court the right to be secure from unreasonable search and seizure and from the use by a state of evidence so acquired is a fundamental principle of liberty and justice lying at the base of our civil and political institutions. Other applicable decisions of this court hold that such a fundamental right is protected from state action by the due process clause of the Fourteenth Amendment and that a conviction procured by

the use of evidence so acquired by a state is void, as lacking the essential elements of due process, and is subject to review, on certiorari, by this court.

The cases sustaining these propositions are:

Brown v. Mississippi, 297 U. S. 278, 80 L. ed. 682;

Powell v. Alabama, 287 U. S. 45, 77 L. ed. 158;

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716;

Lisenba v. California, 62 Sup. Ct. 280, L. ed. Advs. Ops. Vol. 86, p. 179.

In each of the foregoing cases this court granted certiorari to review a conviction in a state court, where the petitioner had set up and claimed a constitutional right based upon the state denying to him a fundamental principle of liberty and justice. This court exercised its jurisdiction on the ground that such fundamental principle was guaranteed by the due process of law clause of the Fourteenth Amendment.

STATEMENTS REQUIRED BY RULES 12 AND 38 OF THE SUPREME COURT.

In the petition for the writ filed herein by petitioners there has been set forth in detail all of the statements required by rules 12 and 38 of this court. Said statements are hereby specially referred to and made a part of this brief and will be found in the petition under the headings and at the pages here designated, viz.:

(a) Jurisdiction of the court, *supra,* page 8.

(b) Cases sustaining jurisdiction, *supra,* page 9.

(c) Decision and judgment of the California Supreme Court, *supra,* page 9.

(d) Stage and proceedings in court of first instance at which and the manner in which the federal questions sought to be reviewed were raised, *supra,* page 10.

(e) Time and manner in which federal questions were raised in the Supreme Court of California and that court's action thereon, *supra,* page 24.

(f) Grounds upon which it is contended that the questions involved are substantial, *supra,* page 28.

STATEMENT OF FACTS.

A statement of the case setting forth all that is material to a consideration of the questions presented, with appropriate page references to the record, has been set forth in the preceding petition under the heading "Statement of the Case", *supra,* pages 2 to 7, and under the heading "The Stage in the Proceedings in the Court of First Instance at Which and the Manner in Which the Federal Questions Were Raised", *supra,* pages 10 to 24.

The facts, so set forth in detail in the petition, have been correctly summarized in the majority opinion of respondent court as follows:

> "On June 17, 1940, an indictment was filed charging defendants Gonzales and Chierotti with

having conspired together on May 25, 1940, to commit grand theft by fraudulent representations to Secundo Valenzano regarding a machine that purportedly could reproduce United States currency with the use of certain chemicals. The evidence showed that defendant Gonzales, after striking up an acquaintance with Secundo Valenzano, told Valenzano that a rich man had the machine, that real currency was necessary in making the reproductions, and that he would surreptitiously get possession of the machine and bring it to Valenzano's saloon. He brought the machine there, put some real bills into it, used the chemicals, and when the machine was opened, there were two bills for each one originally inserted. Thereupon Gonzales told Valenzano that if he could get several thousand dollars in new bills, equal to an amount to be furnished by Gonzales, each could double his money by using the machine. Valenzano put up no money but notified the police who arrested both Gonzales and Chierotti.

Valenzano was the only witness who testified to the foregoing events. Police Officer Iredale testified that on June 6, 1940, he and Police Officer Linss, without any warrant, authority, or permission, entered the apartment of defendant Chierotti in the latter's absence and took therefrom a black case containing not only bottles of liquid but a machine, subsequently identified by Valenzano as that used by Gonzales. Chierotti and Gonzales objected to any testimony by Officer Iredale regarding the entry and search of Chierotti's apartment and the seizure of the case and contents, as well as to the introduction and use of the latter as evidence, on the ground that

> the entry, search, seizure, and use of the property violated the rights guaranteed by Chierotti by the Fourteenth Amendment to the Constitution of the United States, and the search and seizure and due process clauses of the Constitution of California. (Cal. Const. Art. I, secs. 19, 13.)" (R. 380-1.)
>
> "Many months before the trial Chierotti filed a written motion for an order directing the return to him of the case and contents, and the exclusion from evidence, not only of this property, but of any testimony of the officers regarding the search and seizure or based on information acquired as a result thereof. The motion was denied." (R. 382.)

The foregoing motion was supported by the affidavit of Chierotti, both of which specially invoked the due process of law clause of the Fourteenth Amendment. The written motion will be found set forth in the petition, *supra,* page 10, and the supporting affidavit will be found therein, *supra,* page 14. Constantly and throughout the trial, all evidence relative to the unlawful search and seizure was consistently objected to by each petitioner, as was the introduction in evidence of the case and its contents so taken by state officers from Chierotti's apartment, on the grounds that the use of such evidence was in violation of the due process clause of the Fourteenth Amendment. Each of these objections was overruled by the trial court. The portions of the record showing the testimony objected to, the grounds of the objection and the court's ruling thereon are set forth in the foregoing petition at pages 16 to 23.

Before the California Supreme Court the convictions were challenged on the ground that they lacked the essential elements of due process of law in that the Fourteenth Amendment prohibited the state from using evidence against either of the petitioners acquired as the result of the unlawful search of Chierotti's apartment and the seizure of the physical evidence therein. The Supreme Court of California denied these constitutional rights.

SPECIFICATION OF ERRORS.

1. Respondent court erred in holding that the use of evidence, against a defendant in a criminal trial, over his timely objection, acquired by the state conducting an unlawful and unreasonable search of said defendant's home, was not prohibited by the due process clause of the Fourteenth Amendment.

2. Respondent court erred in holding that a defendant in a criminal case was not entitled to have his guilt or innocence established without use by the state of evidence acquired by it as the result of an unlawful search of defendant's home and the seizure of physical property therein and that the use of evidence so acquired by the state was not a denial of due process of law.

3. That respondent court erred in holding that the conviction of each petitioner herein was not lacking in the essential elements of due process of law, even though such conviction was based upon evidence ac-

quired by the state in conducting an unlawful and unreasonable search of petitioner Chierotti's home and used over his seasonable objection.

ARGUMENT.

1. STATEMENT OF THE QUESTION INVOLVED AND THE UNDERLYING FACTS.

The record discloses that the entry into the home of Chierotti and the following search and seizure therein by officers of the State of California were unreasonable and unlawful. This appears from the stipulations entered into, approved by the trial court, during the trial of the action (R. 126-128), and also from the motion made by Chierotti for the return of the property and to suppress and exclude all evidence acquired by such unreasonable search and seizure, the State having failed in any manner to deny and controvert the facts set forth in the supporting affidavit filed by Chierotti. Under such circumstances the only question involved is whether these admitted facts establish a right protected by the Fourteenth Amendment. (*Hill v. Texas,* decided June 1, 1942, L. ed. Adv. Ops. Vol. 86, 1090, 1091.)

The petitioners did not wait until the time of trial to urge objections against the use by the State of such illegally acquired evidence. Six months before the trial petitioner Chierotti moved the court for an order directing the return to him of such property and suppressing and excluding the same from evidence to-

gether with all evidence and testimony relating to such illegal search and seizure.

The constitutional questions involved really resolve themselves into one pertinent query, to wit: Is not the right to be secure from unreasonable search and seizure by state officers such a fundamental principle of liberty and justice as to be included within the due process clause of the Fourteenth Amendment, and, if so, does not such right extend to prohibiting the State from using evidence so acquired against the person from whom it was taken?

Phrased differently and based upon the language used in this court in *Chambers v. Florida, supra,* the question involved is as follows: Petitioners having seasonably asserted the right under the Federal Constitution to have their guilt or innocence determined without reliance upon evidence obtained by the State by means proscribed by the due process clause of the Fourteenth Amendment, is not each of their convictions void where the State used such evidence and authorized the jury to determine the question of guilt or innocence by considering such evidence?

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2. **ANY RIGHT WHICH IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE IS PROTECTED FROM STATE ACTION BY THE FOURTEENTH AMENDMENT.**

This court has consistently held that any right which is a fundamental principle of liberty and justice is protected by the due process clause of the

Fourteenth Amendment. This holding has been made whether or not such right is set forth in any of the first eight amendments to the Constitution; but the fact that such right is included in one of said amendments adds greater force to the contention that it is a fundamental principle of liberty and justice.

We here call attention to the leading cases which have announced the foregoing doctrine.

In *Powell v. Alabama,* 287 U. S. 45, 77 L. ed. 158, certain negroes had been convicted in the State of Alabama of the crime of rape. Certiorari was granted by the Supreme Court of the United States to review the convictions *solely on the ground that the defendant Powell had not been allowed to be represented by counsel at the trial.* The contention was raised that the right to have counsel was contained in the Sixth Amendment to the Federal Constitution which did not operate upon the states and therefore did not fall within the due process clause of the Fourteenth Amendment. This court held to the contrary and in doing so announced that it was the duty of the court to decide "whether the denial of the assistance of counsel contravenes the due process clause of the Fourteenth Amendment of the Federal Constitution." (p. 60.) This court then, at page 67, stated:

> *"The fact that the right involved is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'* (Hebert v. Louisiana, 272 U. S. 312, 316, 71 L. ed. 270, 272, 48 A.L.R. 1102,

47 S. Ct. 103), *is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process clause of the Fourteenth Amendment, although it be specifically dealt with in another part of the federal Constitution.* Evidently this court, in the later cases enumerated, regarded the rights there under consideration as of this fundamental character. That some such distinction must be observed is foreshadowed in Twining v. New Jersey, 211 U. S. 78, 99, 53 L. ed. 97, 106, 29 S. Ct. 14, where Mr. Justice Moody, speaking for the court, said that '* * * *it is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action because a denial of them would be a denial of due process of law.* Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 S. Ct. 581. *If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.'* While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, make it clear that the right to the aid of counsel is of this fundamental character."

In *Mooney v. Holohan,* 294 U. S. 103, 79 L. ed. 791, our State Attorney General contended that a deprivation of due process could not result from any act of a prosecuting attorney, such as the introduction of known perjured testimony. The Supreme Court held against this contention and said:

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. *That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.* Hebert v. Louisiana, 272 U. S. 312, 316, 317, 71 L. ed. 270, 273, 47 S. Ct. 103, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. *Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.*"

In *Brown v. Mississippi,* 297 U. S. 278, 80 L. ed. 682, three negroes were convicted of murder in the courts of the State of Mississippi. The only evidence connecting the defendants with the crime were confessions obtained from the defendants by means of force and torture. The state supreme court upheld the convictions on the ground that immunity from self-incrimination was not essential to due process of law and that the admission of the confessions was mere error in the trial of the cause and not the violation of a constitutional right. The Supreme Court of the United States granted a writ of certiorari and

reversed the convictions on the ground that the use of such evidence violated the due process clause of the Fourteenth Amendment.

When the matter was before this court the State of Mississippi contended that the extortion of a confession, while it might constitute self-incrimination, did not violate a Federal constitutional right. The Supreme Court disposed of this contention as follows:

> "The State stresses the statement in Twining v. New Jersey, 211 U. S. 78, 114, 53 L. ed. 97, 112, 29 S. Ct. 14, that 'exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution,' and the statement in Snyder v. Massachusetts, 291 U. S. 97, 105, 78 L. ed. 674, 677, 54 S. Ct. 330, 90 A.L.R. 575, that 'the privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the State'. But the question of the right of the State to withdraw the privilege against self-incrimination is not here involved. *The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter.*"

It will be noted that this court held the right of a State to compel self-incrimination was limited to the right of a State, by statutory sanction, to call an accused as a witness and require him to testify; *that to compel him to give evidence against himself other than in a mode sanctioned by law and justice fell within the condemnation of the Constitution.*

In the case at bar, the procuring of evidence against petitioner in a manner directly condemned by the Constitution, is the equivalent of procuring such evidence in a manner not sanctioned by law.

In *Brown v. Mississippi,* supra, this court announced the limitations upon a State's power to regulate the procedure of its courts as follows:

> "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'."

The Supreme Court, after discussing the case of *Powell v. Alabama, supra,* and *Mooney v. Holohan, supra,* then stated:

> "And the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. *The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'.*"

Following which the Supreme Court reversed the convictions on the ground that defendants had been deprived of due process of law and closed their opinion with the following language:

> "In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence

upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. *The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner.* Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791, 55 S. Ct. 340, 98 A.L.R. 406, supra. *It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment.* That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. *The court thus denied a federal right fully established and specially set up and claimed and the judgment must be reversed.*"

This court has thus declared that if any personal rights, protected and guaranteed by the first eight amendments of the Constitution of the United States, are of such a character that they cannot be denied without violating "those fundamental principles of liberty and justice which lie at the base of all of our civil and political institutions", such rights come within the due process provision of the Fourteenth Amendment.

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3. THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES IS A FUNDAMENTAL PRINCIPLE OF LIBERTY AND JUSTICE PROTECTED BY THE FOURTEENTH AMENDMENT.

In every instance where this court has been called upon to construe the right to be secure from unreasonable search and seizure, as announced in the Fourth

Amendment, it has unequivocally held such right to be a fundamental principle of liberty and justice.

We quote from a few decisions of this court defining the high nature of the right and giving some of the history leading to its establishment.

In *Gouled v. United States,* 255 U. S. 298, 65 L. ed. 647, the Supreme Court, in discussing the Fourth and Fifth Amendments to the Federal Constitution said:

> "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (citing cases) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decisions cited is that *such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundmental rights of the individual citizen*—the right, to trial by jury, to the writ of habeas corpus and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers."

In *Byars v. United States,* 273 U. S. 28, 33, 71 L. ed. 520, 524, it is said:

> "The 4th Amendment was adopted in view of long misuse of power in the matter of searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

In the case of *Boyd v. United States,* 116 U. S. 616, 29 L. ed. 746, the court devotes many pages to the history that led up to the Fourth Amendment to the Constitution of the United States and deals at length with the decision of Lord Camden in the case of *Entick v. Carrington* wherein the holding was first made that officials could not unlawfully enter an Englishman's house and take therefrom any books, papers or effects or use them thereafter for the purpose of prosecuting the home owner. The decision is quoted from at length and Mr. Justice Bradley, speaking for the court, said that the decision of Lord Camden "was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country" and that it was regarded "as one of the permanent monuments of the British Constitution".

The court then points out that the rules laid down by Lord Camden were in the minds of the framers of our Constitution at the time of the adoption of the Fourth Amendment, and, at page 630 of the reported case, referring to the importance of the rights so secured said:

"The principles laid down in this opinion *affect the very essence of constitutional liberty and security.* They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. *It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense;* it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. *Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment.* In this regard the Fourth and Fifth Amendments run almost into each other."

At page 633, this court dwelt upon the evil results that would follow from giving any other interpretation to the Fourth Amendment, and in doing so said:

"We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in

a criminal case to be a witness against himself', which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

In the more recent case of *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 75 L. ed. 374, 382, the foregoing principles were reaffirmed by the Supreme Court:

"The first clause of the 4th Amendment declares: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.' It is general and forbids every search that is unreasonable; *it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made and the papers taken.* Gouled v. United States, 255 U. S. 298, 307, 65 L. ed. 647, 651, 41 S. Ct. 261. The second clause declares, 'and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized'. This prevents the issue of warrants on loose, vague or doubtful bases of fact. It emphasizes the purpose to protect against all general searches. *Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every state in the Union.* Agnello v. United States, 269 U. S. 20, 33, 70 L. ed. 145, 149, 51 A.L.R. 409, 46 S. Ct. 4. *The need of protection against them is attested alike by history and present conditions. The Amend-*

ment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted."

"General searches have long been deemed to violate fundamental rights. It is plain that the Amendment forbids them. In Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, Mr. Justice Bradley, writing for the court, said (p. 624): 'In order to ascertain the nature of the proceedings intended by the 4th Amendment to the Constitution under the terms "unreasonable searches and seizures", it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worse instrument of arbitrary power, the most destructive of English liberty, that ever was found in an English law book"; since they placed "the liberty of every man in the hands of every petty officer".' And in Weeks v. United States, 232 U. S. 383, * * * Mr. Justice Day, writing for the court, said (p. 391): 'The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all

alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws'."

Marron v. United States, 275 U. S. 192, 195, 72 L. ed. 231, 236.

In *Weeks v. United States,* 232 U. S. 383, 391, 58 L. ed. 652, 655, it is said:

"In *Bram v. United States,* 168 U. S. 532, 42 L. ed. 568, 18 Sup. Ct. Rep. 183, 10 Am. Crim. Rep. 547, this court, in speaking by the present Chief Justice of Boyd's Case, dealing with the 4th and 5th Amendments, said (544):

'It was in that case demonstrated that both of these Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.' "

Summarized the decisions of this court have pronounced the constitutional prohibition against unlawful search and seizure to be a right **"indispensible to the 'full enjoyment of personal security, personal liberty and private property' "** and that it is **"to be regarded as the very essence of constitutional liberty"** (*Gouled v. United States, supra*); that it is an **"indefeasible right of personal security, personal liberty and private property"** (*Boyd v. United States, supra*); that it is a **principle "of humanity and civil**

liberty" (*Weeks v. United States, supra*); and that a violation of such right is **"obnoxious to fundamental principles of liberty"** (*Go-Bart Importing Co. v. United States, supra*) and has **"long been deemed to violate fundamental rights"**. (*Marron v. United States, supra.*)

The foregoing clearly establishes that the right to be secure against unlawful search and seizure is brought within the purview of due process as contained in the Fourteenth Amendment.

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4. THE RIGHT TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES PROHIBITS THE USE AS EVIDENCE OF THE PROPERTY OBTAINED AND KNOWLEDGE GAINED THEREBY.

The majority opinion of the California Supreme Court attempts to draw a distinction between the unlawful search conducted by state officers and the use as evidence of property taken or knowledge acquired as the result of such unlawful search by stating:

> "In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures' may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not neces-

> sarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law." (R. 383.)

The foregoing is directly contrary to the decisions of this court which, in every instance, have held that to acknowledge the right but to permit the use of evidence or information acquired in violation of the right is in effect to nullify the right itself.

In *Olmstead v. United States,* 277 U. S. 438, 463, 72 L. ed. 944, 950, this court said:

> "But in the Weeks Case, and those which followed, this court decided with great emphasis, and established as the law for the Federal courts, that *the protection of the 4th Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received."*

Silverthorne Lumber Co. v. United States, 251 U. S. 382, 64 L. ed. 319, 24 A. L. R. 1426, was a case where an indictment had been brought against the two Silverthornes and they were arrested and detained in custody. While in custody a representative of the Federal Government, without a warrant, went to the office of the Silverthornes and took all the papers and records that were there. A motion was made for the return of these papers. The Government had made copies thereof. The court ordered

the originals returned to the defendant, and new indictments were found by the grand jury based upon the evidence illegally obtained. *This court held that not only were the Silverthornes entitled to the return of their original papers but that the Government could not use any information thereby obtained either at the trial or for the purpose of procuring new indictments,* and said:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession; but not any advantages that the government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, L. R. A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1117, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. *In our opinion such is not the law. It reduces the 4th Amendment to a form of words.* 232 U. S. 393. *The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.* Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent

source they may be proved like any others, but *the knowledge gained by the government's own wrong cannot be used by it in the way proposed.*"

In *Weeks v. United States, supra,* we find a set of facts paralleling those in the case at bar, and in dealing with the use of evidence acquired by an unlawful search and seizure this court said:

> "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well as other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. *If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.*"

Byars v. United States, 273 U. S. 28, 71 L. ed. 520, 522, is a reaffirmation of the doctrine:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been tolerated by this Court, *nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed.*"

Thus, the right to be immune from an unlawful search and seizure by the state includes the right not to have used against one, as evidence in a criminal case, property or information acquired by the state while conducting such unlawful search and making such unlawful seizure.

In every instance this court has condemned *the use* by a state of evidence acquired in a manner proscribed by the Constitution.

In *Chambers v. Florida, supra,* the Fourteenth Amendment was deemed to be violated when the state used a confession improperly obtained. This court's language follows:

> "However, *use by a State* of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment. Since petitioners have seasonably asserted the right under the Federal Constitution *to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process*

clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns."

In *Mooney v. Holohan, supra,* the court held that *the use* by a state of known perjured testimony as evidence violated the due process clause. *Brown v. Mississippi, supra, Lisenba v. California, supra,* and all other cases dealing with confessions extorted by force, violence or intimidation, held convictions, *based upon their use,* void as lacking due process of law.

It is *the use* by a state of evidence acquired in a manner proscribed by the Constitution that constitutes the taking of life, liberty or property without due process of law.

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5. NO DISTINCTION EXISTS BETWEEN THE USE OF CONFESSIONS OBTAINED IN VIOLATION OF THE CONSTITUTION AND THE USE OF EVIDENCE ACQUIRED BY AN UNREASONABLE SEARCH AND SEIZURE.

The majority opinion of the California Supreme Court acknowledges that the use by a state of a confession procured by force, violence or intimidation constitutes a denial of due process of law. This opinion, however, attempts to draw a distinction between such unlawfully procured confessions and evidence acquired by an unlawful search and seizure by holding that the manner of procuring the confession has been declared by this court to be obnoxious to the Fourteenth Amendment because "a confession obtained by coercion or torture is so unreliable that its

use violates all concepts of fairness and justice" while the use of evidence "obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial." (R. 384.)

The foregoing reasoning of the California court is fallacious and directly contrary to the doctrine announced by this court.

In the recent case of *Lisenba v. California, supra,* it is expressly stated that the rule as to confessions *was not based on the fact that they may be false.* This court's language therein is as follows:

> "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false."

In *Marron v. United States,* 275 U. S. 192, 196, 72 L. ed. 231, 237, this court has placed convictions obtained by means of unlawful seizures and forced confessions on identically the same footing:

> "The tendency of those who execute the criminal laws of the country to obtain conviction *by means of unlawful seizures and enforced confessions* * * * should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

As demonstrative of the fallacy of the respondent court's decision and as showing that there is no distinction, in the constitutional right involved, between

enforced confessions and property obtained by unlawful seizures we present the two following hypothetical cases:

Case 1. A man has committed a crime. A state officer points a gun at him and under threat of shooting him to death forces him to sign a confession of guilt. There is no other evidence presented in the case except proof of the *corpus delicti* and the confession. The man is convicted.

Under the interpretation of the Fourteenth Amendment, as accepted by the majority opinion of respondent court, the use of such confession, procured under such circumstances, is a violation of the Fourteenth Amendment and necessitates a reversal of the conviction.

Case 2. A man has committed a crime. A state officer at the point of a gun enters his home and under threat of shooting him to death compels him to deliver over incriminating evidence. There is no other evidence presented in the case except proof of the *corpus delicti* and the incriminating evidence procured by the state officer under the foregoing circumstances. The man is convicted.

As the Fourteenth Amendment excludes the use of the confession in Case 1 it must equally exclude the use of the incriminating evidence in Case 2. In each instance the evidence has been procured in identically the same manner. Yet, under the interpretation of the majority opinion, the incriminating evidence would be admissible in Case 2 although the confession in

Case 1 would be inadmissible. No distinction exists between the two cases.

The reasoning pursued by this court in *Lisenba v. California, supra,* demonstrates that a state cannot use any evidence procured in a manner condemned by the Constitution, whether it be an enforced confession or evidence acquired by an unlawful search and seizure. We quote in part from the *Lisenba* case.

> "To extort testimony from a defendant by physical torture in the very presence of the trial tribunal is not due process. *The case stands no better if torture induces an extrajudicial confession which is used as evidence in the courtroom.*
>
> A trial dominated by mob violence in the courtroom is not such as due process demands. *The case can stand no better if mob violence anterior to the trial is the inducing cause of the defendant's alleged confession.* * * *
>
> The concept of due process would void a trial in which, by threats or promises in the presence of court and jury, a defendant was induced to testify against himself. *The case can stand no better if, by resort to the same means, the defendant is induced to confess and his confession is given in evidence.*"

Applying the foregoing reasoning to the case at bar, it must be held that if during the trial Chierotti in the courtroom was compelled by the state to produce the bag and its contents, such action would constitute a denial of due process of law and render his conviction void. The case can stand no better because, anterior to trial, the state procured from

Chierotti the bag and its contents in a manner condemned by the Constitution and then used it as evidence against him in the trial.

As no distinction exists between the use of evidence procured by unlawful search and seizure and the use of enforced confessions all doctrines and decisions which have held convictions void which were based on forced confessions must equally apply to the instant case where the convictions were based on evidence acquired by unlawful search and seizure.

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6. AS THE CONVICTION OF CHIEROTTI IS VOID THE CONVICTION OF GONZALES MUST BE REVERSED.

Throughout this brief the constitutional right claimed pertains solely to petitioner Chierotti and, it may be argued, that petitioner Gonzales is not entitled to avail himself of another's constitutional right.

Under the law a reversal of the conviction of Chierotti necessitates a reversal of the conviction of Gonzales.

Where only two persons are charged and convicted of a conspiracy, a reversal of the cause as to one necessitates a reversal of the cause as to the other. This is based on the legal proposition that the crime of conspiracy is indivisible and unless it be established that each of two persons was a part of the same conspiracy there has been a total failure of proof.

In *Cofer v. United States,* 37 Fed. (2d) 677, *four men were convicted* of a criminal conspiracy and ap-

pealed. It developed that *as to three of the men evidence had been admitted against them which had been procured by an unlawful search and seizure.* The court held that the cause had to be reversed as to the three for such reason and also held that this made it mandatory to reverse the cause as to the fourth. Its language, on page 680, is as follows:

> "The remaining appellant, Fred Hamilton, was not searched, nor was any of his property seized, and no question as to illegal evidence of that nature arises in his favor. The conspiracy was charged to have been between the four appellants and one Glen Davis, whose acquittal was directed by the District Judge. The conclusion we have reached as to the three appellants, together with the elimination of Glen Davis from the case, leaves the conviction of the appellant Fred Hamilton alone standing. *The rule in conspiracy cases is that, when the conviction of all the conspirators except one is reversed, the conviction of that one should also be reversed,* since, in conspiracy cases, at least two must be convicted or none."

In *Morrow v. United States,* 11 Fed. (2d) 256, 260, the Circuit Court of Appeals therein stated:

> "This error affected the substantial rights of defendant Greyson, necessitating a reversal of the case as to him, which carries a reversal as to the other defendant; this being a prosecution for conspiracy of Morrow and Greyson. Turinetti v. United States (C.C.A.), 2 F. (2d) 15."

In *Morrison v. California,* 291 U.S. 82, 93, 78 L. ed. 665, 672, two defendants were charged and convicted

of a conspiracy. This Court reversed this conviction, stating:

> "The conviction failing as to the one defendant must fail as to the other. Turinetti v. United States (C.C.A. 9th), 2 F. (2d) 15, supra; Williams v. United States (C.C.A. 4th), 282 Fed. 481, 484; Gebardi v. United States, supra."

CONCLUSION.

We believe that the foregoing conclusively demonstrates that the right to be secure from unlawful search and seizure is one of those fundamental principles of liberty and justice which a state cannot deny to a defendant under the due process clause of the Fourteenth Amendment. This right includes the right to have returned any property the state has acquired by an unlawful search and to have excluded from evidence such property together with any knowledge or information acquired by the state in conducting the unlawful search and seizure.

In the instant case the state relied on the bag and contents found in Chierotti's apartment as being the salient factor in establishing the conspiracy charged in the indictment. This physical evidence, having been acquired by the state in a manner proscribed by the Constitution, could not be relied on by the state to establish the charge as Chierotti, months before the trial, had invoked his constitutional right and demanded the return of the property to him and the exclusion of it from the evidence at the trial. Each

petitioner, throughout the trial, constantly objected to any evidence acquired as the result of the unlawful search and seizure. Before the California Supreme Court these constitutional questions were raised, argued, considered by that court and the claimed constitutional right denied to each of them. This constituted a denial of due process of law.

Dated, San Francisco, California,
July 27, 1942.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 276

JOHN GONZALES and JOHN CHIEROTTI,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. SUMMARY OF PROCEEDINGS

Petitioners have filed with this Court their petition for a writ of certiorari to the Supreme Court of the State of California to annul judgments of conviction of felony entered against them in the Superior Court of the State of California, in and for the City and County of San Francisco, and affirmed by said Supreme Court.* The asserted

* The Opinion of the Supreme Court of California is reported in 20 Advance California Reports at pages 158 and 353 and 124 Pacific Reporter, Second Series, at page 44.

ground for annulling said judgments is that petitioners were denied due process of law in the proceedings leading up to said judgments by the receipt therein of certain physical evidence secured from the apartment of petitioner Chierotti and testimony of the police officers taking this evidence respecting the same, where entrance to the apartment of petitioner Chierotti was accomplished without a search warrant and without the consent of any person, save the clerk and janitor of the apartment house in which Chierotti resided, who let the officers into said apartment.

II. THE QUESTION PRESENTED

Petitioners' contentions are variously stated, but a reading of the petition and brief appended thereto demonstrates that the sole question presented by these proceedings is whether the receipt in evidence in a prosecution in a State court of certain paraphernalia taken by subordinate police officers from the apartment of a defendant in the proceeding without a warrant, and the receipt of testimony respecting the taking of such paraphernalia, constitute a denial of the due process of law required by Article Fourteen of Amendments to the Constitution of the United States.

We shall demonstrate that no substantial federal question is presented in this proceeding.

III. STATEMENT OF THE CASE

The facts referred to in petitioners' statement of the case, pages 2 through 7, and in their statement of facts, pages 38 through 41, are not disputed, but we do not accede to a number of the argumentative statements contained in these portions of the petition and brief, and for that reason state the ultimate facts we deem necessary to determination herein.

For the purposes of this proceeding, it may be assumed that two police officers of the City and County of San Francisco, State of California, entered the residential apartment of petitioner Chierotti after the door to the same was opened by the janitor of the apartment house, at the request of the clerk in charge thereof, without the consent of petitioner Chierotti, and without any warrant, writ or process of any court, and without the consent of petitioner Chierotti (pp. 18 and 19 of the Petition herein); that upon entrance to petitioner Chierotti's said apartment, the police officers observed and took possession of a certain black bag and its contents subsequently introduced in evidence in the trial of petitioners; that petitioners, assuming their right to so object, offered timely and appropriate objections to the introduction of said physical evidence, and all testimony respecting the same and the entrance into Chierotti's apartment and that petitioner Chierotti, assuming his right so to do, made timely and appropriate demand for the suppression and return of this physical evidence; and

that petitioners have exhausted their remedies respecting these matters in the courts of California.

It is established, also, that petitioner Chierotti stated to the arresting officers at the time of his arrest that he resided at an address other than that entered and searched by the police officers. (Reporter's Transcript on Appeal, p. 101, lines 13-19.)*

IV. ARGUMENT

A. Introductory

The Constitution of the State of California, Article I, Section 19, provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

The foregoing provision of the Constitution of the State of California has been interpreted by the courts of California as not preventing the introduction in evidence in criminal proceedings in the courts of California of evidence seized in violation of the constitutional provision and statutes of the State enacted in furtherance thereof.

> *People* v. *Mayen,* 188 Cal. 237, 205 Pac. 435;
> *People* v. *Gonzales,* 20 A. C. 158 and 353; 124 Pac. (2) 44, and cases cited.

* The Attorney General has not been furnished a copy of either the typewritten or printed record.

The doctrine of these cases is the specific application of the common law rule that competent and admissible evidence will be admitted without inquiry as to its source or the manner in which it was obtained.

People v. *Alden,* 113 Cal. 264, 45 Pac. 327;
Olmstead v. *U. S.,* 277 U. S. 438 at 463 and 467, 48 S. Ct. 564;
Wigmore on Evidence (Third Edition) 1940, Section 2183.

It must be taken as conceded that the individual states may, by statute or judicial declaration of its common law, determine the rules of evidence to be followed in their courts subject only to the limitation that such rules of evidence may not be so applied as to deprive an accused of a fair trial and the due process contemplated by the Fourteenth Article of Amendment to the Constitution of the United States.

Olmstead v. *U. S., supra;*
Fong Y. Ting v. *U. S.,* 149 U. S. 698 at 729, 13 S. Ct. 1016;
Adams v. *New York,* 192 U. S. 585, 24 S. Ct. 372.

B. Article Four of Amendments to the Constitution of the United States does not apply to the State of California

It appears conceded by petitioners that Article Four of Amendments to the Constitution of the United States, as interpreted by this Court, does

not apply to the states. This is certainly the holding of the authorities.

Weeks v. *United States,* 232 U. S. 383, 34 S. Ct. 341;
Palko v. *Connecticut,* 302 U. S. 319, at 323, 327, 58 S. Ct. 149;
Burdeau v. *McDowell,* 256 U. S. 465, 41 S. Ct. 574.

This rule extends to proceedings in the courts of the United States and evidence seized by State officers without a warrant is admissible in proceedings of the courts of the United States.

Weeks v. *United States, supra;*
Burdeau v. *McDowell, supra;*
Center v. *United States,* 267 U. S. 575, 45 S. Ct. 230.

C. Article Fourteen of Amendments to the Constitution of the United States does not apply

1. Article Fourteen of Amendments to the Constitution of the United States does not by its terms, or in effect, impose upon the individual states the limitations upon the United States contained in Articles One to Eight of Amendments

Palko v. *Connecticut, supra;*
Snyder v. *Massachusetts,* 291 U. S. 97, 54 S. Ct. 330;
Twining v. *New Jersey,* 211 U. S. 78, 29 S. Ct. 14.

See, also:

Charles Warren "The New Liberty Under the Fourteenth Amendment," 39 Harvard Law Review, 431;

Edwin S. Corwin "The Doctrine of Due Process Before the Civil War." 24 Harvard Law Review, 366.

2. There was no denial of due process by the admission and consideration of the seized evidence

Neither reason nor authority supports petitioners' contention that their conviction was without the due process guaranteed to them by the Constitution of the United States. As the Supreme Court of California points out in its opinion herein, assuming that the unlawful entry and seizure of evidence should be held to constitute a denial of due process, it does not follow that the receipt of such seized evidence in a judicial proceeding deprives the litigants of due process. The opinion reads in part (p. 163):

> "The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (*People* v. *Defore*, 242 N. Y. 13 (150 N. E. 585); *People* v. *Mayen, supra; Com.* v. *Donnelly*, 246 Mass. 507 (141 N. E. 500); *Johnson* v. *State*, 152 Ga. 271 (109 S. E. 662, 19 A. L. R. 641).) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judg-

ment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (8 Wigmore, Evidence, (3rd. ed.) sec. 2183, p. 5, and cases there cited.)"

It appears conceded, as it must be, that no case has ever determined that the introduction of genuine and competent evidence, however obtained, constitutes a denial of due process as contemplated by Article Fourteen of Amendments.

In the decisions of this Court cited by petitioners, altogether different questions were presented. In each of them the invasion of the rights of the persons undergoing prosecution operated directly upon the evidence or the proceeding itself. Here any deprivation of right or privilege of which petitioner Chierotti may complain occurred before the inception and entirely outside of the judicial proceeding. The probative effect of the evidence introduced was not affected by the means by which it came to court. The evidence was not *created* in whole or in part by the action of the police officers.

This Court has held that evidence unlawfully seized by State officers and other persons may, nevertheless, be received in a federal prosecution when the federal officers do not participate in the improper seizure.

Weeks v. *United States, supra;*
Burdeau v. *McDowell, supra;*
Center v. *United States, supra.*

If petitioners' contention were tenable, it is obvious that one from whom evidence is taken without warrant is deprived of a fair hearing and due process of law to the same extent when the evidence is received by the courts of the United States as he is when it is received in the courts of the states.

The basis of the exclusionary doctrine of the United States courts is their interpretation of the Fourth Amendment. Since the Constitution, statutes and common law of California do not require a similar holding, and the evidence was admissible though seized without a warrant, petitioners were fairly tried according to law.

3. The question presented has been determined by this Court

In the case of *McIntyre* v. *State,* 190 Ga. 872, 11 S. E. (2d) 5, 312 U. S. 695, 61 S. Ct. 732, this Court, on March 3, 1941, denied, without opinion, a petition for writ of certiorari to the Supreme Court of the State of Georgia, which had, on September 24, 1940, affirmed a judgment of conviction in a trial court in the State of Georgia in a proceeding in which evidence seized from the person and automobile of the defendant by State officers, without a warrant, was received in evidence over the objection of the defendant that the receipt of such evidence contravened the provisions of the Fourteenth Article of Amendment.

The opinion of the Supreme Court of Georgia upon this question reads in part:

"Only the constitutional questions relating to admissibility in evidence of articles introduced for the purpose of showing that the defendant was engaged in operating a lottery, which articles were taken from him and his automobile by State officers without a warrant, and the admissibility of oral testimony relating to such articles, require elaboration. It is alleged that all such evidence was illegal as in contravention of the Federal and State constitutions. The defendant contends that the admission of this evidence . . . violated the 'due process of law' provision in the 14th amendment of the United States constitution."

* * *

"We turn now to the question whether the admission of the alleged lottery evidence violated the 'due process of law' clause of the 14th Federal amendment. . . .

* * *

"Accordingly, irrespective of the correctness or incorrectness of the questioned rule of evidence as held in cases of this court based upon earlier decisions both of the United States Supreme Court and this court, or the rule as held in other cases of the United States Supreme Court with regard to the admissibility of such evidence when obtained by *Federal* officers and offered in *Federal* trials, under no view would such a rule of evidence and procedure in a State court constitute a violation of the 'due process' afforded by the 14th Federal amendment."

(11 Southeastern Reporter, (2d), pp. 8, 9 and 11.)

The proceedings in the Georgia courts in this case were identical with those in this proceeding, and the denial of the petition in that case is a direct precedent for the denial of the petition in this case.

V. CONCLUSION

We respectfully submit that no substantial federal question is presented by the record in this proceeding; that no invasion of petitioners' rights was committed by the courts of California and that the petition for writ of certiorari should be denied.

Dated: August 18, 1942.

Respectfully submitted.

EARL WARREN,
Attorney General of the
State of California,

J. ALBERT HUTCHINSON,
Deputy Attorney General.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 276

JOHN GONZALES and JOHN CHIEROTTI,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

PETITION FOR A REHEARING

By Petitioners After Order Denying Issuance of Writ of Certiorari to the Supreme Court of the State of California.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners above named hereby ask the above Court for a rehearing of their petition for a writ of certiorari to the Supreme Court of the State of California, after an order of this Court denying the same, made and entered on the 12th day of October, 1942.

In so doing, petitioners verily believe that this Court has not given full consideration to the importance of the constitutional question involved and probably has been misled by certain statements contained in the brief filed by respondent in opposition to the original petition.

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1. **THE FACTS SURROUNDING THE VIOLATION OF THE CONSTITUTIONAL RIGHT STAND ADMITTED IN THE RECORD.**

The factual situation stands uncontradicted in the record and is conceded in respondent's brief (p. 3) as follows:

> "* * * two police officers of the City and County of San Francisco, State of California, entered the residential apartment of petitioner Chierotti after the door to the same was opened by the janitor of the apartment house, at the request of the clerk in charge thereof, *without the consent of petitioner Chierotti, and without any warrant, writ or process of any court, and without the consent of the petitioner Chierotti* (pp. 18 and 19 of the Petition herein); that upon entrance to Chierotti's said apartment, the police officers observed a certain black bag and its contents subsequently introduced in evidence in the trial of petitioners; that *petitioners,* assuming their right to so object, *offered timely and appropriate objections to the introduction of said physical evidence, and all testimony respecting the same* and the entrance into Chierotti's apartment and *that petitioner Chierotti,* assuming his right so to do, *made timely and appropriate demand for the suppression and re-*

turn of this physical evidence; and that petitioners have exhausted their remedies respecting these matters in the courts of California." (Emphasis added.)

The black bag and contents was the only evidence rendering in any way sufficient the proof to support the charge.

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2. SUMMARY OF GROUNDS ON WHICH PETITIONER SOUGHT ISSUANCE OF THE WRIT.

The petitioner Chierotti, several months prior to trial having moved to suppress all evidence acquired by and testimony relating to the unlawful search and seizure conducted in his residence, contended that his conviction was in violation of the due process clause of the Fourteenth Amendment on the following grounds, to wit:

(a) The right to be secure against unreasonable searches and seizures is a fundamental principle of liberty and justice lying at the base of our civil and political institutions.

Gouled v. United States, 255 U. S. 298, 65 L. ed. 647;

Byars v. United States, 273 U. S. 28, 33, 71 L. ed. 520, 524;

Boyd v. United States, 116 U. S. 616, 630, 29 L. ed. 746;

Go-Bart Importing Co. v. United States, 282 U. S. 344, 75 L. ed. 374, 382;

Weeks v. United States, 232 U. S. 383, 391, 58 L. ed. 652, 655;

Marron v. United States, 275 U. S. 192, 195, 75 L. ed. 231, 236.

(b) Any right which is a fundamental principle of liberty and justice is protected from state action by the Fourteenth Amendment and will be enforced by writ of certiorari issued to the state court by the Supreme Court of the United States.

Powell v. Alabama, 287 U. S. 45, 67, 77 L. ed. 158, 169;

Mooney v. Holohan, 294 U. S. 103, 112, 79 L. ed. 791, 794;

Brown v. Mississippi, 297 U. S. 278, 285, 80 L. ed. 682, 686;

Chambers v. Florida, 309 U. S. 227, 84 L. ed. 716.

(c) The right to be secure against unreasonable search and seizure prohibits the use as evidence, where timely objection has been made, of property or knowledge acquired by such search and seizure.

Olmstead v. United States, 277 U. S. 438, 463, 72 L. ed. 944, 950;

Silverthorne Lumber Co. v. United States, 251 U. S. 382, 64 L. ed. 319;

Weeks v. United States, 232 U. S. 383, 393, 58 L. ed. 652, 656;

Byars v. United States, 273 U. S. 28, 29, 71 L. ed. 520, 522.

(d) The convictions of defendants, being based on evidence acquired as the result of unlawful search and seizure by state officers, timely objection to the use thereof having been made prior to trial, is void

as lacking the essential elements of due process in that the right to be secure against unlawful search and seizure is a fundamental principle of liberty and justice and the use of such evidence violates the safeguard of the due process clause of the Fourteenth Amendment and should be annulled by this court on certiorari.

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3. **WHERE PROVISIONS OF THE FEDERAL AND A STATE CONSTITUTION ARE IDENTICAL, ADOPTED TO SAFEGUARD THE SAME RIGHTS AND PREVENT OR CORRECT THE SAME EVILS THEIR CONSTRUCTION AND APPLICATION MUST BE THE SAME.**

Respondent has laid stress on the fact that Article I, section 19 of the California Constitution, reading as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

can be construed by the Supreme Court of California in any way it sees fit and that such court has construed it as merely prohibiting the unlawful search and seizure, while allowing the fruits thereof to be used as evidence in a criminal trial against the person whose constitutional right has been violated.

That this provision of the California Constitution and the Fourth Amendment to the Federal Constitution were each adopted for the same reasons and

to correct and prevent the same evils can brook no argument. The Supreme Court of California has so stated in *People v. Mayen,* 188 Cal. 237, 249,

> "It may be taken for granted that the provisions of our own constitution and those of nearly all the states of the Union against unreasonable searches and seizures, and protecting the citizen from being compelled in any criminal case to be a witness against himself, *have been adopted, in almost the precise words and for the same reason, as in the federal constitution. They are safeguards designed to protect the intimate sanctity of the person and the home from invasion by the state.*"

The adoption of both the State and Federal Constitutional provisions against unlawful searches and seizures having been brought about as the result of the same evils, to correct the same abuses and to accord the same rights they each must be given the same interpretation and effect.

This court has held the law to be as above stated:

> "But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, *the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties however differently worded, should have as far as possible the same interpretations;* and that where the constitution, as in the cases of Massachusetts and New Hampshire, declares that the subject

> shall not be 'compelled to accuse or furnish evidence against himself;' *such a provision should not have a different interpretation from that which belongs to constitutions like those of the United States* and of New York, which declare that no person shall be 'compelled in any criminal case to be a witness against himself'." (Emphasis added.)
>
> *Counselman v. Hitchcock,* 142 U. S. 547, 584, 35 L. ed. 1110, 1121.

To allow a state to interpret its own constitutional provision in a manner contrary to the parent provision found in the Federal Constitution, *can lead only to confusion and injustice.*

As illustrative of this we need but call attention to recent proceedings held in the federal and state courts of California. On July 16, 1942, a man named Vernon Davis was indicted in the United States District Court for the Northern District of California for the unlawful sale and possession of narcotics, which were procured by federal and state officers as the result of an unlawful search and seizure. Davis moved the District Court for an order suppressing and excluding the narcotics as evidence and the district judge not only granted the motion but ordered the indictment dismissed, as having been founded upon such unlawfully acquired evidence. Immediately on the dismissal of the indictment Davis was arrested by state officers and charged with the unlawful sale and possession of the same narcotics under the state law. He moved the state court to suppress

and exclude the evidence and such motion, under the authority of the present case, was denied. Here is a situation where identically the same constitutional right is involved. Such right is upheld by one court and denied by another.

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4. THE DIVERSITY OF DECISION AMONG THE SEVERAL STATES, CONSTRUING THE CONSTITUTIONAL RIGHT INVOLVED, NECESSITATES ACTION BY THIS COURT TO THE END THAT THE OPERATION OF THE RIGHT BE UNIFORM THROUGHOUT THE UNION.

Cornelius, in The Law of Search and Seizure (1930), sec. 7, p. 36 et seq., states that the courts of last resort of *nineteen states have adopted the Federal doctrine,* that the courts of *twenty-three states have rejected such doctrine,* while in the remaining states the question has been reserved for future decision.

It is the object of our system of government and the aim of all judicial function that equality before the law be maintained inviolate and that personal rights, whether created by statute or embodied in Constitutions, be uniform in their operation and equal in their application.

The decisions of this court which we have cited are uniform to the effect that the right to be secure against unlawful search and seizure is a fundamental principle of liberty and justice lying at the base of our institutions and incorporated in our Constitution to correct the evils of the day and to insure for all

time to come that such evils shall never again be allowed to arise in this land of liberty and justice.

The original States of the Union insisted on this great right being specifically announced and preserved. In after years, each new state on being admitted to the Union acknowledged this right and its importance, by accepting the Constitution of the United States as the supreme law of the land and by embodying in its own organic law an identical provision. In so acknowledging, accepting and repromulgating this great right, each state undoubtedly intended that it would be interpreted, applied and enforced in all its pristine vigor, and that no action by federal or state governmental agency should result in paying word tribute to the right while denying adequate means wherewith to enjoy and preserve the right.

To state, in one breath, that the right is paramount and then to hold in another that property or knowledge acquired by government officials in violation of the right can be used against an accused, is to reduce the right to a mere form of words.

Yet, in the years that followed the admission of the states into the Union, the courts of many of these states have effectually denied this right while acknowledging, with empty words, its existence.

Either the right does or does not exist. If it exists, then it must be enforced and protected and this can only be done by construing the right so that every citizen is protected from such unlawful and arbitrary

action by state governments and denying to the states the right to avail themselves of their own wrongful acts.

In perilous times, such as we are now living in, no greater duty devolves upon this court than the preservation of the rights which our forefathers died to protect. This Nation was born as the result of English governmental oppression. Then we fought to be free from such oppression, now we are fighting that such oppression shall not again be visited upon us by dictator nations. The rights that were of such importance then are of equal importance today. No question of expediency can justify encroachment on any of these rights. A war to preserve them cannot be won by their present denial.

The diversity of decision among the states requires that this court consider the question involved and announced a rule whereby the right be uniformly interpreted and enforced to its fullest throughout each state of the Nation.

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5. RESPECTABLE FEDERAL AUTHORITY EXISTS IN SUPPORT OF PETITIONERS' CONTENTION.

In *Hague v. C. I. O.*, 101 Fed. (2d) 774, the United States Circuit Court of Appeals for the Third Circuit, in dealing with the question of whether the right to be secure from unlawful search and seizure was protected by the Fourteenth Amendment from state action said (all italics added):

"The Fourth Amendment to the Constitution of the United States provides, 'The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, * * *.' The right so protected is a fundamental civil right and in our opinion is a privilege of Federal citizenship. *As such it is secured against abridgment by the states by the privileges or immunities clause of the Fourteenth Amendment as well as by the due process clause of that Amendment.*" (p. 781.)

"* * * it is elementary that the Bill of Rights was designed as a curb upon the power of the Federal government which it was feared might encroach upon the rights of the states. We are unable to perceive any reason, however, why the right to be free from unreasonable searches and seizures set forth in the Fourth Amendment should not stand upon a parity today with freedom of religion, of speech, of the press and of assembly as guaranteed by the First Amendment. All of these rights are of equal importance to the individual and in our opinion they stand as pari materia.

"Liberty of the person, including freedom of locomotion, is, as we have seen, one of '* * * the privileges or immunities of citizens of the United States * * *' protected by the Fourteenth Amendment against abridgment by the States. Among those rights and liberties of which the states may not deprive the individual under the due process clause of that Amendment are freedom of speech, Stromberg v. California, 283 U. S. 359, 51 S. Ct. 332, 75 L. Ed. 1117, 73 A. L.

R. 1484, and freedom of the press, Gitlow v. New York, supra. *In our opinion freedom from unreasonable searches and seizures is included as well."* (pp. 787-8.)

"It follows therefore that the fundamental civil rights secured to citizens of the United States by the First and Fourth Amendments are secured in the sense of being protected or guaranteed against interference by State action by the Fourteenth Amendment." (p. 788.)

(This court took over the above case but declined to pass on the question. [307 U. S. 496, 83 L. Ed. 1423.])

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6. TIMELY MOTION TO SUPPRESS THE EVIDENCE HAVING BEEN MADE IN THE TRIAL COURT, THE CASE IS CONTROLLED BY THE DECISION IN WEEKS v. UNITED STATES AND NOT BY ADAMS v. NEW YORK.

Herein a motion to suppress and exclude the evidence obtained by the unlawful search and seizure was made in the trial court a reasonable time before trial. (T. 4.)

Respondent relies on the case of *Adams v. New York,* 192 U. S. 585, 24 S. Ct. 372, as authority for the action of the state court in denying the motion and admitting the evidence.

The *Adams case* was distinguished and partially overruled in the later case of *Weeks v. United States,* 232 U. S. 383, 58 L. ed. 652.

In the *Adams case,* a prosecution in the state court, it was held that a trial court would not stop the trial

to determine the manner in which competent evidence had been acquired by the state, that its only duty was to determine whether the offered evidence was competent. No motion prior to trial was made to suppress the evidence on the ground it had been procured by unlawful search and seizure, the objection being made for the first time at the trial when the evidence was offered by the state.

Shortly thereafter this court determined the *Weeks case,* which ever since has been the law. In the *Weeks case,* Weeks had seasonably moved the trial court for an order suppressing and ordering the return of property so unlawfully acquired. The trial court denied the motion. In holding such action erroneous this court pointed out the difference between the facts in the *Adams case* and the one under consideration and stated (all italics supplied):

> "While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the government to be the correct rule of law under such circumstances, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. Such proposition, the government asserts, is conclusively established by certain decisions of this court, the first of which is Adams v. New York, supra. * * * It was further held (in the Adams case), approving in that respect the doctrine laid down in 1 Greenleaf, Ev. 254a, that it was no valid objection to the use of the papers that they had been thus seized, and that the

> courts *in the course of a trial* would not make an issue to determine that question, and many state cases were cited in support of that doctrine." (p. 395.)

This court then pointed out that in the *Adams case* there had been no objection prior to trial while in the *Weeks case* such an objection had been seasonably made prior to trial, whereupon, at page 396, it stated:

> "It is therefore evident that the Adams Case affords no authority for the action of the court in this case, *when applied to in due season* for the return of papers seized in violation of the Constitutional Amendment."

The conclusion of this court appears on page 397 as follows:

> "We therefore reach the conclusion that the letters were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; *that having made a seasonable application for their return,* which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused * * *."

Here, seasonable application for the return of the evidence and its exclusion having been made, the case is controlled by the decision in the *Weeks case* and not by the *Adams case.*

Respondent has asserted that this court has already determined the question involved adversely to peti-

tioners, and bases this assertion on the fact that this court denied certiorari in *McIntyre v. Georgia,* 312 U. S. 695. There are two answers to this assertion.

First, it has always been our understanding that denial of certiorari does not constitute an affirmance by this court of any principle of law stated in the case below.

Second, the case of *McIntyre v. Georgia* falls within the rule announced in *Adams v. New York, supra,* while the present case falls within the rule announced in *Weeks v. United States, supra.*

CONCLUSION.

For each of the foregoing reasons petitioners represent that the question involved is of such import that this court should definitely determine it, and, to that end, that a rehearing be granted and the writ ordered issued as prayed.

Dated, San Francisco, California,
October 30, 1942.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am attorney for petitioners in the above entitled cause and proceeding and that, in my judgment, the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, San Francisco, California,
October 30, 1942.

LEO R. FRIEDMAN,
Attorney for Petitioners.